



February 9, 2001

Mr. John M. Hill
Cowles & Thompson
901 Main Street, Suite 4000
Dallas, Texas 75202-3793

OR2001-0507

Dear Mr. Hill:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 144059.

The Town of Addison (the "town"), which your firm represents, received a request for eighteen enumerated categories of information, including the personnel files of two named individuals except for "the home address, home phone number, and health information" contained in each personnel file. You have submitted for our review documents from the personnel file of each named individual. You assert that these documents are excepted from disclosure, in whole or in part, under sections 552.101, 552.102, 552.117, and 552.130 of the Government Code. You indicate that the remaining information responsive to the request has been released to the requestor. We have considered the exceptions you claim and reviewed the submitted information.

At the outset, we note that in your initial correspondence to this office dated December 4, 2000, you also raised sections 552.107 and 552.111 of the Government Code. In your correspondence dated December 11, 2000, at page 3, you also reference section 552.103 of the Government Code. You otherwise have submitted no comments or arguments in support of these exceptions, nor did you label any of the submitted information as subject to any of these exceptions. In addition, section 552.103 was not raised within ten business days after the town received the request. *See* Gov't Code § 552.301(b), (e)(1)(A), (2). Because the town did not comply with the requirements of section 552.301 with respect to the section 552.103, 552.107, and 552.111 assertions, information which may otherwise be subject to these exceptions "is presumed to be subject to required public disclosure and

must be released unless there is a compelling reason to withhold the information.” *See* Gov’t Code § 552.302. Sections 552.103, 552.107, and 552.111 are discretionary exceptions under the Public Information Act and do not demonstrate a compelling reason to withhold information from the public. *See, e.g.,* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). We accordingly do not address the section 552.103, 552.107, and 552.111 assertions.

Section 552.117 of the Government Code provides in relevant part:

Information is excepted from [required public disclosure] if it is information that relates to the home address, home telephone number, or social security number, or that reveals whether the following person has family members:

- (1) a current . . . employee of a governmental body, except as otherwise provided by Section 552.024[.]

Section 552.024 of the Government Code provides in relevant part:

(a) Each employee . . . shall choose whether to allow public access to the information in the custody of the governmental body that relates to the person’s home address, home telephone number, or social security number, or that reveals whether the person has family members.

(b) Each employee . . . shall state that person’s choice under Subsection (a) to the main personnel officer of the governmental body in a signed writing not later than the 14th day after the date on which:

- (1) the employee begins employment with the governmental body[.]

...

(c) If the employee . . . chooses not to allow public access to the information, the information is [excepted from disclosure under section 552.117].

(d) If an employee . . . *fails to state the person’s choice within the period established by this section, the information is subject to public access.*

(e) An employee . . . who wishes to close or open public access to the information may request in writing that the main personnel officer of the governmental body close or open access.

Gov’t Code § 552.024 (emphasis added). We note at the outset, as stated above, that the request does not encompass the home address or home phone number of the two employees

whose personnel files have been requested. Thus, the town may redact this information from the submitted documents. With respect to the social security number and information that reveals whether the employee has family members, you state:

[Section 552.024] does not require, and nothing in the Act requires, that the election be made prior to the receipt of an open records request, but in fact subsection (e) allows the election to be made at any time. Therefore, information relating to the employees' social security number or that reveals whether the employee has family members may be withheld.

We disagree. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989); *see also* Gov't Code § 552.024(d). Therefore, the town may only withhold information under section 552.117 on behalf of an employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. In addition to certain information you redacted from the documents prior to submitting them to this office, we have marked information in the submitted documents that is subject to section 552.117. If either of the employees whose information is the subject of the present request timely elected to keep their social security number and family member information confidential, the town must withhold this information pursuant to section 552.117. However, the town may not withhold this information under section 552.117 if the employee did not make a timely election to keep the information confidential.¹

Section 552.130 provides in relevant part:

(a) Information is excepted from [required public disclosure] if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the documents and information we have marked, pursuant to section 552.130.

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). Section 552.101 excepts from disclosure "information considered to be

¹As discussed below, the social security numbers in the submitted documents may nevertheless be confidential under section 552.101 of the Government Code.

confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Act. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, we shall address the section 552.102 assertion by next considering the extent to which the information is excepted from disclosure under section 552.101 in conjunction with the common law right to privacy.

Common law privacy excepts from disclosure information if (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). A public employee’s allocation of his salary to a *voluntary* investment program offered by his employer is a personal investment decision, and information about it is excepted from disclosure by a common law right of privacy if the transactions are not funded in whole or in part with public monies. Open Records Decision Nos. 600 (1992) (TexFlex benefits), 545 (1992) (deferred compensation plan). Where a transaction is funded in part by the state, however, it involves the expenditure of public monies in which there exists a legitimate public interest and the transaction therefore is not protected by privacy. Open Records Decision No. 600 (1992). We have marked the personal financial information at issue. We assume this information pertains to voluntary decisions made by the individual and the transactions at issue are not funded in whole or in part with public monies. Based on this assumption, we have marked the documents and information that must be withheld under sections 552.101 and 552.102. The remaining information, however, is not protected by a right of privacy and may not be withheld on that basis. See Open Records Decision Nos. 470 (1987) (public employee’s job performance does not generally constitute his private affairs), 455 (1987) (public employee’s job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees).

In addition to common law privacy, section 552.101 excepts from disclosure information made confidential by statute. The submitted documents include employee W-4 forms, which are excepted from disclosure by section 6103(a) of title 26 of the United States Code. Open Records Decision No. 600 (1992). In addition, information on a federal W-2 form regarding the amount of federal income and FICA tax withheld and total FICA wages is also excepted by section 6103(a) of title 26 of the United States Code. Open Records Decision No. 226

(1979). We have marked the documents and information that must be withheld pursuant to section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code.

Finally, we note that a social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers at issue are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the town pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, the employee social security numbers and information that reveals whether the employee has family members is excepted from disclosure under section 552.117 only if the employee made a timely election under section 552.024 to keep this information confidential. Section 552.130 requires the town to withhold the driver's license numbers and documents we have marked. To the extent the financial information and documents we have marked pertain to voluntary decisions in which the transactions do not involve the expenditure of public funds, the town must withhold this information pursuant to section 552.102 and section 552.101 in conjunction with the common law right of privacy. The town must also withhold the information and documents we have marked pursuant to section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. Finally, if the social security numbers are not excepted under section 552.117, this information may nevertheless be excepted under section 552.101 in conjunction with 42 U.S.C. § 405(c)(2)(C)(viii)(I), as provided above. For your convenience, we have marked with red flags the documents that contain our markings. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

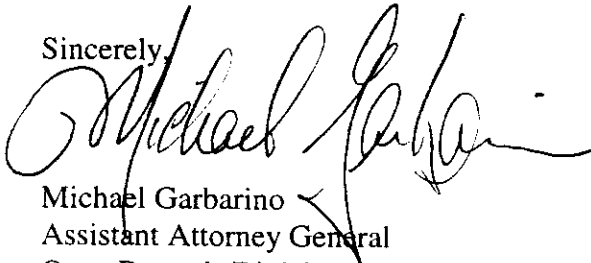
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 144059

Encl. Submitted documents

cc: Mr. Jim Bearden
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P.O. Box 5
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(w/o enclosures)